Mechnatech Engineering and Construction Sdn Bhd v Siegle & Epple (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCVC-1210–12 OF 2011
AMELIA TEE ABDULLAH J
8 MARCH 2012

Civil Procedure — Summary judgment — Application — Claim for sum owing for subcontract work, provision of manpower and delivery of metal fabrications, construction materials and services — Payment to be made according to invoices issued from time to time — Whether default of payment occurred — Whether amount claimed accurate

In the present application, the plaintiff claimed against the defendant for a sum of RM2,765,294.70 for subcontract work carried out, provision of manpower and the supply and delivery of metal fabrications, construction materials and services. In addition or alternatively, the plaintiff prayed for an order to allow the bailiff or sheriff of the High Court, accompanied by the servants or agents of the plaintiff, to enter the premises where the goods which were not paid for were kept, using such reasonable force as might be necessary, and to deliver or return the said goods to the plaintiff. The defendant contended that the amount of the claim and the invoices issued were inaccurate and the plaintiff did not take into account the actual amount of goods supplied and the amount that had been paid. Subsequently, the plaintiff applied for summary judgment to be entered against the defendant. The plaintiff averred that it was an agreed term and condition that the defendant was to make payment according to the invoices issued from time to time. The director of the defendant deposed that the plaintiff's claim of RM2,765,294.70 was inaccurate as it did not take into account the amounts paid by the defendant to the plaintiff. She claimed that the plaintiff had failed to take into account the sum of RM50,000. All the plaintiff's invoices were for the full value of the goods supplied or work done and the down payments had not been deducted from subsequent invoices issued. Despite complaints made to the plaintiff, and the plaintiff's promise to look into the matter, to date the plaintiff had not provided any invoice which showed that deductions had been made for the down payments.

Held, allowing the application:

(1) The deponent was only querying a total of RM150,000 in down payments not accounted for; a double claim of RM187,920; and a debit note of RM2,000 in respect of notices of violations. Apart from the above, the defendant had not disputed the plaintiff's claim. As such, the

plaintiff had prayed for summary judgment to be entered against the defendant for the amount claimed less the amounts which were disputed by the defendant (see para 16).

(2) In light of the clear confirmation by the defendant's executive director that a sum of RM2,531,225.70 was overdue as at 24 October 2011, the court was of the view that this was an amount for which the court could have allowed summary judgment to be entered. The court had further considered the amounts which were disputed by the defendant amounting to a total of RM339,920. If this amount were to be deducted from the amount of RM2,765,294.70 claimed, the balance of RM2,425,374.70 would still be a sum smaller than the amount confirmed to be outstanding (see para 18).

(3) The plaintiff conceded that there was no lien on the property. Further, there was an issue of the goods being no longer in the possession of the defendant but in the hands of a third party. The third party from whose premises the plaintiff was seeking to recover goods was never brought into the picture by the plaintiff. There was no averment of any cause to believe that there were still goods not paid for that were yet to be incorporated into the construction of the third party's premises. In the circumstances, to allow the plaintiff's additional or alternative prayer would not be a correct, legal or viable option to make (see para 24).

(4) The plaintiff had succeeded in showing that it had an unarguable case for the sum of RM2,425,374.70. The court was satisfied that the defendant had not raised any triable issues in respect of this amount in the face of the defendant's own confirmation of a larger overdue payment (see para 25).

[Bahasa Malaysia summary

Dalam permohonan ini, plaintif menuntut terhadap defendan sejumlah RM2,765,294.70 bagi kerja-kerja subkontrak yang dijalankan, peruntukan pekerja-pekerja dan pembekalan dan penghantaran bahan-bahan besi, material-material pembinaan dan perkhidmatan-perkhidmatan. Tambahan atau secara alternatifnya, plaintif memohon bagi perintah untuk membenarkan bailif atau syerif Mahkamah Tinggi, disertai oleh kakitangan atau ejen-ejen plaintif untuk memasuki premis-premis yang mana barang-barang yang belum dibayar disimpan, menggunakan kekerasan yang munasabah yang mungkin perlu dan untuk menyerahkan atau memulangkan barang-barang tersebut kepada plaintif. Defendan menghujahkan bahawa jumlah tuntutan dan invois-invois yang dikeluarkan tidak tepat dan plaintif tidak mengambil kira jumlah sebenar barang-barang yang dibekalkan dan jumlah yang telah dibayar. Oleh itu, plaintif memohon bagi penghakiman ringkas untuk dimasukkan terhadap defendan. Plaintif menegaskan bahawa adalah menjadi terma dan syarat yang dipersetujui bahawa defendan perlu membuat bayaran mengikut invois-invois yang dikeluarkan dari masa ke

semasa. Pengarah defendan memberi keterangan bahawa tuntutan plaintif sebanyak RM2,765,294.70 adalah tidak tepat kerana ia tidak mengambil kira jumlah sebanyak RM50,000. Kesemua invois-invois plaintif adalah bagi nilai penuh barang-barang yang dibekalkan atau kerja-kerja yang dijalankan dan wang pendahuluan belum ditolak daripada invois-invois yang dikeluarkan seterusnya. Walaupun aduan-aduan dibuat kepada plaintif dan janji plaintif untuk melihat perkara tersebut, hingga kini plaintif masih belum memberikan apa-apa invois yang menunjukkan penolakan telah dibuat bagi wang pendahuluan.

Diputuskan, membenarkan permohonan:

(1) Deponen hanya meminta sejumlah RM150,000 sebagai wang pendahuluan yang tidak dikira; satu tuntutan berganda sebanyak RM187,920; dan nota debit sebanyak RM2,000 bagi notis-notis pelanggaran. Selain daripada yang di atas, defendan tidak mempertikaikan tuntutan plaintif. Dengan itu, plaintif memohon bagi penghakiman ringkas agar dimasukkan terhadap defendan bagi jumlah yang dituntut kurang daripada jumlah yang dipertikaikan oleh defendan (lihat perenggan 16).

(2) Berdasarkan pengesahan yang jelas oleh pengarah eksekutif defendan bahawa jumlah RM2,531,225.70 adalah tertunggak pada 24 Oktober 2011, mahkamah berpandangan bahawa ini adalah jumlah yang mana mahkamah sepatutnya boleh membenarkan penghakiman ringkas dimasukkan. Mahkamah seterusnya mempertimbangkan bahawa jumlah-jumlah yang dipertikaikan oleh defendan berjumlah RM339,920. Jika jumlah ini ditolak daripada jumlah RM2,765,294.70 yang dituntut, baki RM2,425,374.70 masih lagi menjadi jumlah yang lebih kecil daripada jumlah yang disahkan tertunggak (lihat perenggan 18).

(3) Plaintif memperakui bahawa tidak terdapat lien pada hartanah tersebut. Tambahan lagi, terdapat isu bahawa masih barang-barang tersebut bukan lagi dalam milikan defendan tetapi dalam milikan pihak ketiga. Pihak ketiga yang mana premisnya plaintif ingin mendapatkan barang-barang tidak pernah dibangkitkan oleh plaintif. Tiada sebarang hujahan untuk mempercayai bahawa terdapat barang-barang yang belum dibayar kerana ia belum dimasukkan dalam pembinaan premis-premis pihak ketiga. Dalam hal keadaan ini, untuk membenarkan permohonan tambahan atau alternatif plaintif adalah pilihan yang tidak betul, tidak sah atau berdaya maju (lihat perenggan 24).

(4) Plaintif telah berjaya membuktikan bahawa ia mempunyai kes yang tidak boleh disangkal bagi wang sejumlah RM2,425,374.70. Mahkamah berpuas hati bahawa defendan tidak membangkitkan apa-apa isu yang

boleh dibicarakan bagi jumlah ini dalam keadaan pengesahan defendan sendiri bahawa terdapat pembayaran tertunggak yang lebih besar (lihat perenggan 25).]

Notes

For cases on application, see 2(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 8439–8440.

Cases referred to

Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282, CA (refd)
Emilia Shipping Inc v State Enterprise, For Pulp and Paper Industries [1991] 2 MLJ 379; [1991] 1 LNS 74, HC (refd)

Legislation referred to

Rules of the High Court 1980 O 14, O 29 r 6

Goik Ken Zu (Nasir, Kenzin & Tan) for the plaintiff.
Kumaari (Kanesh Sundrum & Co) for the defendant.

Amelia Tee Abdullah J:

DECISION (ENCL 5)

[1] The plaintiff, Mechnatech Engineering and Construction Sdn Bhd, claims against the defendant, Siegle & Epple (M) Sdn Bhd, for a sum of RM2,765,294.70 for subcontract work carried out, provision of manpower and the supply and delivery of metal fabrications, construction materials and services in connection therewith. In addition or alternatively, the plaintiff prays for an order to allow the bailiff or sheriff of the High Court, accompanied by the servants or agents of the plaintiff, to enter Campus 1, Lot 2357, 5779, 6054, 6055, 8753, 8754, 9887 and HS(D) 22939, Lebuh Sungai Tiram 1, Mukim 12 SWD, Phase 2, FTZ, Bayan Lepas, Pulau Pinang or any premises where the goods which were not paid for are kept, using such reasonable force as may be necessary, and to deliver or return the said goods to the plaintiff.

[2] The plaintiff's claim is denied by the defendant who contends that the amount of the claim and the invoices issued were inaccurate and did not take into account the actual amount of goods supplied and the amount that had been paid.

[3] Vide a summons in chambers (encl 5), the plaintiff applied for summary judgment to be entered against the defendant for a sum of RM2,765,294.70 and alternatively for an order to allow the bailiff or sheriff of the High Court, accompanied by the servants or agents of the plaintiff, to enter Campus 1, Lot 2357, 5779, 6054, 6055, 8753, 8754, 9887 and HS(D) 22939, Lebuh Sungai

Tiram 1, Mukim 12 SWD, Phase 2, FTZ, Bayan Lepas, Pulau Pinang or any premises where the goods which were not paid for are kept, using such reasonable force as may be necessary, and to deliver or return the said goods to the plaintiff. A list of the goods which had not been paid for is attached to the summons in chambers.

THE PLAINTIFF'S AFFIDAVIT IN SUPPORT — ENCL 6

[4] The plaintiff's application is supported by the affidavit in support of Lim Song Yong, a director of the plaintiff. In para 5, the deponent states that the defendant is indebted to the plaintiff for a sum of RM2,765,294.70 in respect of the contract known as 'PCW F028, CHW F02C Pipe Installation For The B Braun Project/Bayan Lepas' for services and goods which had been delivered to the defendant. The plaintiff had carried out the sub-contract works, provided services in the form of manpower supply and delivered metal fabrications and construction materials to the defendant from time to time.

[5] According to the plaintiff, it was an agreed term and condition that the defendant was to make payment according to the invoices issued from time to time. It was also an important term that the supply of goods to the defendant was subject to a 'Romalpa Clause' which is to say that the ownership of the goods, materials, valves as well as equipment delivered shall not pass until and unless full payment was received for such goods. This term and condition can be seen at exh LSY2 annexed to encl 6.

[6] The plaintiff had carried out the contract works and services and delivered the goods ordered by the defendant to Campus 1, Lot 2357, 5779, 6054, 6055, 8753, 8754, 9887 and HS(D) 22939, Lebuh Sungai Tiram 1, Mukim 12 SWD, Phase 2, FTZ, Bayan Lepas, Pulau Pinang. However, the defendant had only made payment for part of the goods and services leaving an outstanding sum of RM2,765,294.70. A list of the goods not paid for (excluding the supply of labour) is itemised in the statement of claim as well as in encl 6.

[7] In para 14 of the affidavit, it was deposed that the executive director of the defendant, Joerg Stoltenberg, had admitted the amount outstanding when he had confirmed in a letter dated 28 October 2011 that the 'total overdue payment as stated in your books as at 24 October 2011 is RM2,531,226.70' (exh LSY4). As such, the plaintiff contends that the defendant's defence that the calculation of the amount outstanding was inaccurate or that the goods delivered were defective was without basis.

THE DEFENDANT'S AFFIDAVIT IN REPLY — ENCL 7

[8] In her affidavit in reply (encl 7), Martina Gabriele Baur, a director of the

defendant with an address in Stuttgart, Germany, deposed that the plaintiff's claim of RM2,765,294.70 was inaccurate as it did not take into account the amounts paid by the defendant to the plaintiff. She claimed that the plaintiff had failed to take into account the sum of RM50,000 made under Invoice No 30537 and the down payment of RM100,000 which was made under Invoice No 30524. All the plaintiff's invoices were for the full value of the goods supplied or work done and the down payments had not been deducted from subsequent invoices issued. Despite complaints made to the plaintiff, and the plaintiff's promise to look into the matter, to date the plaintiff had not provided any invoice which shows that deductions had been made for the down payments.

[9] The defendant had also averred that the plaintiff had made a double claim through Invoice No 30602 for a 'condensate system' for a sum of RM187,920. Although the plaintiff had agreed to cancel Invoice No 30602, it was not done and the plaintiff had nevertheless claimed for that invoice in this action.

[10] The defendant had also alleged that the plaintiff had failed to take into account debit notes issued by the plaintiff to the defendant as a contra set off to take into account penalties which had been charged to the defendant following safety violations committed by the plaintiff. The amount of the debit notes exhibited in encl 7 is RM2,000.

[11] The defendant contends that the plaintiff was aware at all times that the goods ordered by the defendant would be delivered to the premises of the third party and would be used in the construction of the premises of the third party. After the completion of the construction of the premises, the goods will form part of the premises of the third party and cannot be taken out. The said premises are not under the supervision or control of the defendant and hence the argument that the plaintiff is not entitled to claim ownership of the said goods.

[12] As such, the defendant disputes that the plaintiff is entitled to seek an order to enter the premises and to take possession of the goods since the premises do not belong to the defendant and the defendant is not in possession or control of the premises. Further, all the goods supplied had already been incorporated into the building owned by the third party.

FURTHER AFFIDAVIT OF THE PLAINTIFF — ENCL 8

[13] Lim Song Yong, in a further affidavit in support (encl 8), maintains that the plaintiff's claim is accurate. However, if the defendant's allegation is correct (which was denied), the dispute was only in respect of a sum of RM50,000 +

RM100,000 + RM187,920 = RM337,920. Based on simple mathematical calculations, there would be a sum of RM2,765,294.70 – RM337,920 = RM2,427,374.70 that was not in dispute. And since the defendant did not dispute the sum of RM2,427,374.70, he prayed for summary judgment in respect of that sum.

DECISION

[14] In coming to a decision in respect of encl 5, the court has duly considered the pleadings, affidavits and submissions filed in this case as well as the documentary exhibits relied on by the parties.

[15] The plaintiff contends that the defendant has no defence on the merits as the defendant had admitted the amount claimed at exh LSY4. The court notes that in the said exhibit, the executive director of the defendant, Joerg Stoltenberg, had confirmed that the total overdue payment as at 24 October 2011 is RM2,531,225.70. This is a smaller amount than the RM2,765,294.70 claimed in the statement of claim and in the summary judgment application in encl 5.

[16] From a careful examination of the affidavit of Martina Gabriele Baur in encl 7, the court notes that the deponent was only querying a total of RM150,000 (RM50,000 + RM100,000) in down payments not accounted for; a double claim of RM187,920; and a debit note of RM2,000 in respect of notices of violations. Apart from the above, the defendant had not disputed the plaintiff's claim. As such, the plaintiff had prayed for summary judgment to be entered against the defendant for the amount claimed less the amounts which were disputed by the defendant.

[17] It is trite law that where all the issues are clear and the matter in substance can be decided once and for all without going to trial, the matter ought to be decided in an O 14 application. In the case of *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282, His Lordship Raja Azlan Shah CJ (as His Highness was then) had observed as follows:

> That brings us to the important question whether the assistant registrar was entitled to deal with the case under the RSC Order 14 procedure. We have often said in this court many a time that where all the issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the assistant registrar shall not deal with the whole matter under the RSC Order 14 procedure.

[18] In light of the clear confirmation by the defendant's executive director that a sum of RM2,531,225.70 was overdue as at 24 October 2011, the court is of the view that this is an amount for which the court could have allowed

summary judgment to be entered. The court has further considered the amounts which are disputed by the defendant vide encl 7 amounting to a total of RM339,920. If this amount were to be deducted from the amount of RM2,765,294.70 claimed, the balance of RM2,425,374.70 would still be a sum smaller than the amount confirmed to be outstanding in exh LSY4.

[19] As such, in light of the clear admission of the defendant as to an overdue payment of RM2,531,225.70 and the lack of triable issues raised, the court is satisfied that summary judgment can be entered against the defendant for a sum of RM2,425,374.70.

[20] The court notes that in para 15 of its affidavit in support (encl 6), Lim Song Yong had deposed as to the police report lodged by him after he found the defendant and all its employees suddenly missing and the office at 70-30-65 D' Piazza Mall, 70 Jalan Mahsuri, Bayan Lepas, Pulau Pinang closed without notice on 14 November 2011. The plaintiff was also unable to meet with or contact any of the officers of the defendant as all the employees of the defendant had suddenly disappeared. The defendant had no other management office in Malaysia apart from the registered office which was owned by SH Corporate Services Sdn Bhd. From the above recounting and supported by the fact that Martina Gabriele Baur's address in her affidavit in reply was given as 'Flachter Strasse 2, D-70499 Stuttgart, Germany', the court finds that the plaintiff's concerns about the continued presence of the defendant in Malaysia and hence, the plaintiff's ability to recover the outstanding debt from the defendant, to be well founded.

[21] In para 9 of encl 6, the plaintiff's director had deposed as to the existence of a 'Romalpa Clause' in the plaintiff's terms for the supply of goods. What this means is that the ownership of the goods, material, fabrications and equipment delivered shall not pass until and unless full payment was received for all goods, material, fabrications and equipment. In her affidavit in reply, Martina Gabriele Baur had not disputed the existence of such a term. All that she has deposed to is that the goods were delivered to the premises of a third party to be used for the construction of the premises and that upon completion of the construction, the goods would form part of the premises and cannot be taken out. She further states that the premises are not under the control and supervision of the defendant.

[22] The plaintiff submits that it is only fair, reasonable and equitable for it to be allowed to recover the goods that lawfully belonged to it which the defendant had not paid for. It contends that these goods consisting of pipes, valves, joints, exhaust and equipments can be independently and distinctively identified and separated from other goods and equipments.

[23] The plaintiff has relied on the case of *Emilia Shipping Inc v State Enterprise, For Pulp and Paper Industries* [1991] 2 MLJ 379; [1991] 1 LNS 74 and O 29 r 6 of the RHC 1980. It advanced an argument that since the plaintiff had suffered financial ruin at the hands of the defendant as the latter had closed its office and its operations in Malaysia and is nowhere to be found, it would only be fair for it to be allowed to recover some of its goods and equipment.

[24] The court has carefully perused the provisions of O 29 r 6 but regret that it is unable to see the significance of that order in relation to the facts of our instant case. In this case, the plaintiff concedes that there is no lien on the property. Further, there is an issue of the goods being no longer in the possession of the defendant but in the hands of a third party. The third party from whose premises the plaintiff is seeking to recover goods was never brought into the picture by the plaintiff. There is no averment of any cause to belief that there are still goods not paid for that are yet to be incorporated into the construction of the third party's premises. In the circumstances, the court is of the view that to allow the plaintiff's additional or alternative prayer (ii) of encl 5 would not be a correct, legal or viable option to make.

[25] In conclusion, the court finds that it is satisfied that the plaintiff has succeeded in showing that it has an unarguable case for the sum of RM2,425,374.70. From the defendant's only affidavit, the court is satisfied that the defendant has not raised any triable issues in respect of this amount in the face of the defendant's own confirmation of a larger overdue payment. The court is regrettably unable to grant the plaintiffs prayer (ii) for the reasons aforestated. As such, the court hereby allows the plaintiff's application to enter summary judgment against the defendant for a sum of RM2,425,374.70 and costs to be taxed, unless otherwise agreed.

Application allowed.

Reported by Afiq Mohamad Noor